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No. 1187

# In the Supreme Court of the United States

OCTOBER TERM, 1967

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CLIFFORD JONES, PETITIONER

*v.*

HONORABLE OLIVER GASCH, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

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### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) and of the district court (Pet. App. C) are not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on November 7, 1967. A petition for rehearing was denied on January 31, 1968. The petition for a writ

of certiorari was filed on March 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court of appeals should have issued a writ of mandamus to compel transfer of petitioner's trial for perjury to his home state.

## RULE INVOLVED

Federal Rule of Criminal Procedure 21(b), effective July 1, 1966, provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more counts thereof to another district.

## STATEMENT

Petitioner was indicted in the District of Columbia on January 5, 1966, in three counts charging him with perjury committed during his March 1965 testimony before a District of Columbia grand jury investigating the affairs of Robert G. Baker. The perjury related to a scheme to conceal the true nature of payments by petitioner's corporation (First Western Financial Corp.) to Baker by having the checks from First Western made payable to Wayne Bromley rather than Baker.[1] Petitioner was charged in the per-

[1] This scheme formed the basis of count nine of the indictment of Baker which was returned the same day as the indict-

jury indictment with having falsely told the grand jury (1) that he had not made payments of the kind described, (2) that he had not had a conversation discussing the payment of money to Baker in Bromley's presence and (3) that Bromley had been retained by petitioner as a lawyer and had furnished legislative materials to him.

On March 28, 1966, petitioner moved for a transfer of his trial to Nevada where he resides [2] and for a continuance of his trial to a date subsequent to Baker's. District Judge Curran denied the transfer motion as premature [3] but granted the continuance. On February 17, 1967, following Baker's conviction (appeal from which is presently pending in the court of appeals), a hearing was held on petitioner's renewed transfer motion before Judge Gasch, who had presided at the Baker trial. On April 11, 1967, the judge denied the motion (Pet. App. C). Petitioner's subsequent petition in the court of appeals for a writ of mandamus to compel the granting or reconsideration of the transfer motion was denied by that court, Chief Judge Bazelon dissenting (Pet. App. A). A petition

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ment herein. That count charged that Baker conspired with petitioner and Bromley (who were named as co-conspirators but not defendants) to falsify the incomes of Baker and Bromley for federal income tax purposes.

[2] Petitioner, a former Lieutenant Governor of Nevada, lives in Las Vegas but travels extensively in this country and abroad in connection with business interests.

[3] Federal Rule of Criminal Procedure 21(b), then in effect did not permit transfer, since there was no other district where the prosecution could have been brought, and the Rule permitted transfer only to a district of proper venue.

for rehearing *en banc* was denied *per curiam*, Chief Judge Bazelon dissenting (Pet. App. B(2)).

Petitioner's argument here is centered on his allegations with respect to convenience of parties and witnesses.[4] In an affidavit filed in support of the transfer motion and at the argument of the motion, counsel for petitioner represented that forty character witnesses, living in Nevada, were prepared to testify for petitioner at trial[5] and that another twenty-nine witnesses, also residents of Nevada (whose names, address and occupations were set forth), were necessary to the defense[6] (see H.Tr. 6-7;[7] Pet. App. A, 13-14). In response to the court's inquiry as to the nature of the testimony these twenty-nine witnesses would give, petioner's counsel asserted that at least six of the witnesses were officials of First Western Savings and Loan Association (a subsidiary of First Western Financial Corp.), who were "logical and proper witnesses" in view of the charge against petitioner that

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[4] In the district court and in the court of appeals petitioner argued as one reason for the transfer in the interest of justice an aura of unfavorable publicity that he said would attend his trial because of its relation to the Baker case. That claim is not pressed here.

[5] Of these forty persons, whose names, addresses and occupations were listed, thirty indicated in accompanying letters that it would inconvenience them to appear in the District of Columbia. Three more indicated that appearance would be impossible during 1966 (see Pet. App. A, 14, n. 36).

[6] The cost of transporting all the witnesses to the District of Columbia was estimated at $15,000 (see H.Tr. 53).

[7] "H.Tr." refers to the transcript of the hearing before Judge Gasch, a copy of which is on file with the Clerk of this Court.

he caused checks to be issued by First Western Financial Corp. to Bromley for Baker (H. Tr. 8). Certain witnesses from hotels in Nevada were said to be necessary because it was charged that a conversation between Bromley and petitioner in regard to the payments to Baker had taken place in the Thunderbird Hotel in Nevada (H. Tr. 8).[8] In addition, counsel indicated that petitioner's defense would be predicated to a large extent upon "establishing the plausibility" of what he and First Western Savings and Loan Association had done, in light of the fact that there was a widespread program for obtaining political contributions from savings and loan associations on the West Coast incidental to the 1962 congressional elections. Counsel represented that he thought it would be necessary to call witnesses from other savings and loan associations, "all of whom live on the West Coast", who have been approached "on the very same basis" (H. Tr. 8-9; Pet. App. A, 14, n. 38). Finally, defense counsel told the court that "in due course" a motion to suppress evidence, on the ground that electronic surveillance of petitioner had occurred, would be filed and that at least four F.B.I. agents and three representatives of the telephone company would be required as witnesses (H. Tr. 9-10). Counsel stated that the electronic eavesdropping claim had "evolved as a result of a civil suit that was on file in . . . . Nevada against the telephone company [and] named F.B.I. agents" (H. Tr. 10).

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[8] The majority below was able to "definitely identify two [witnesses] on petitioner's list as falling within that category" (Pet. App. A, 15; n. 40).

The government represented that it intended to call approximately twenty witnesses, of whom thirteen or fourteen reside in Washington, D.C. metropolitan area. At least four of the local witnesses were represented to have direct knowledge of the planning and purpose of the underlying conspiracy between petitioner, Bromley and Baker; four others would be called to testify about, and to identify, various documents relating to the execution of the conspiracy; and the local court reporter would have to be called to introduce the grand jury testimony of petitioner (see Pet. App. A, 15-16, n. 41; H. Tr. 36, 43).[9] None of the government's prospective witnesses was a government employee. In addition, the government pointed out that all counsel resided in the Washington, D.C. area; that the offense could be charged only in the District of Columbia; and that all of the records were located in the District of Columbia (see H. Tr. 30-31, 43). With regard to the claim of the defense that witnesses were necessary to show the widespread program to obtain political contributions from west coast lending institutions in connection with the 1962 elections, the government pointed out that the charges against petitioner referred to conspiratorial activities occurring between April 1963 and mid-1964 (H. Tr. 32-33). As to the

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[9] Government counsel advised the court that some Las Vegas witnesses would have to be called to put in the vouchers and checks relating to the First Western transaction, and he expressed a willingness to settle the matter by stipulation (H. Tr. 36). Defense counsel later stated that he would stipulate with respect to the vouchers and checks and he indicated a willingness to do the same as regards the court reporter's testimony (H. Tr. 48).

proposed motion to suppress, the government noted that the Nevada civil suit referred to by defense counsel had been pending for two years, but that no motion to suppress evidence on the basis of alleged electronic eavesdropping had yet been filed (H. Tr. 34-35).[10]

In denying the motion to transfer, the trial judge considered the fact that the majority of the government's witnesses resided in the District of Columbia, as did all counsel; that the records to be introduced were located in the District; and that the offense was committed in the District of Columbia alone. The judge indicated that the fact that petitioner resided in Nevada was a factor to be considered but was not controlling under *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, and that "sound judicial management would suggest" that the number of petitioner's character witnesses be limited (Pet. App. C, 35-37). With regard to the twenty-nine witnesses alleged to be necessary to the defense, the court stated (Pet. App. C, 36):

> [A] bare assertion that a large number of witnesses will be needed at trial is not sufficient to demonstrate the preponderance of inconvenience necessary to warrant a transfer. [citation omitted.] Nowhere does the defendant disclose the nature of their expected testimony nor does he provide an adequate basis to enable the Court to determine whether these [29] individuals may even be properly classified as "witnesses". In fact,

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[10] Such a motion was filed by petitioner prior to the decision below (see Pet. App. A, 15, n. 39).

> the limited disclosure made by the defendant leaves the Court with some doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense. * * *

## ARGUMENT

The writ of mandamus sought by petitioner was properly denied by the court below. It is well settled that mandamus is an appropriate remedy only in extraordinary circumstances—where it appears that the lower court has acted outside its prescribed jurisdiction, has refused to exercise its authority when it has a duty to do so, or has grossly abused its discretion. *E.g.*, *Will* v. *United States*, 389 U.S. 90, 95-96; *Parr* v. *United States*, 351 U.S. 513, 520; *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383; *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26. Here, such a showing cannot be made. The factors taken into consideration by the judge in denying the transfer motion were appropriate, and the conclusion reached therefrom, on the basis of the presentations by the parties, was not inconsistent with the exercise of a reasonable discretion. Compare *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240.

The charges in this case are limited in scope—whether petitioner lied to a grand jury of the District of Columbia when he denied that payments made to Bromley were intended for Baker and denied discussing the arrangement in Bromley's presence. Only this latter conversation was alleged to have taken place in Nevada. Witnesses from Nevada as to the fact of payment to Bromley by First Western would, as the government represented, necessarily be part of

the government's case. In these circumstances, it was reasonable for the trial judge to seek some clue as to why it would be necessary for the defense to call 29 witnesses from the West, aside from character witnesses. The judge was not, as petitioner contends, requiring that the defendant reveal his defense as a prerequisite to having the convenience of defense witnesses considered. Rather, the judge was merely making a proper inquiry into the relevancy of the testimony of the various witnesses for whose convenience the defense was seeking to transfer the case out of the district where the crime was committed and where the case should normally be tried. See *Lindberg* v. *United States*, 363 F.2d 438 (C.A. 9). The Rule (F.R.Cr.P. 21(b)) permitting transfer obligates the defendant to demonstrate to a substantial degree that the convenience of parties and witnesses and the interest of justice will be served by transfer once an indictment is returned in a district of proper venue. See *United States* v. *Cohen*, 35 F.R.D. 227, 232 (N.D. Calif.); *United States* v. *Luros*, 243 F.Supp. 160, 174 (N.D Iowa), certiorari denied, 382 U.S. 956; *United States* v. *United States Steel Corp.*, 233 F.Supp. 154, 157 (S.D.N.Y.); cf. Notes of Advisory Committee on Rules in 18 U.S.C.A. F.R. Crim.P. 1-31, 1967 Cum. Supp. p. 206, par. 2.

Representations by counsel as to the number of witnesses required, even where the witnesses are named and their occupations given, will not always be sufficient to establish the relevancy of testimony. Petitioner's assertion (Pet. 6) that Judge Gasch, "in weighing the convenience of the witnesses, effectively credit-

ed petitioner with no (zero) witnesses," is refuted by the court's opinion. The court stated (Pet. App. C, 36): "[T]he limited disclosure made by the defendant leaves the Court with some doubt whether these 29 individuals will *all* be necessary witnesses to matters of relevance for the defense" (emphasis supplied). The judge then went on to indicate his inability to comprehend the relevance of testimony by "four F.B.I. agents, eight Las Vegas telephone company employees, and six California savings and loan executives". (Pet. App. C, 36). The judge's difficulty in this respect is understandable in view of the fact that the validity, or even "plausibility", of the arrangements made by petitioner was not an issue in the case; the only issue was whether petitioner lied about the arrangements which he made with Bromley and Baker. The district judge's finding that petitioner failed to make an adequate showing of the relevance of witnesses' testimony was not based on the lack of specificity of the disclosures made by petitioner's counsel but on the irrelevance of the theory that they were supposed to sustain.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1968.

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# PETITIONER'S

# REPLY

# BRIEF

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

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### REPLY STATEMENT

The respondent's formulation of the question presented and his statement of facts requires of petitioner some further exposition of the facts in order that this Court may proceed from an accurate and balanced portrayal of the record. Respondent puts the question this way:

> "Whether the court of appeals should have issued a writ of mandamus to compel transfer of petitioner's trial for perjury *to his home state.*" (R. Br. 2[1]) (Emphasis added.)

Petitioner has not, however, insisted that the trial be held in his home state. He has requested only that the trial be held somewhere in the West—Los Angeles, Phoenix, Salt Lake City or Las Vegas—so that he and his witnesses will not be put to the inconvenience and expense of traveling 2,500 miles for trial in the District of Columbia. (H. Tr. 21-22, 53-54[2]).

Petitioner offered to stipulate with respect to a number of formal matters such as verification of checks and vouchers and the testimony of the court reporter who transcribed petitioner's grand jury testimony to the end of materially reducing the number of the government's District of Columbia witnesses (H. Tr. 48; see Chief Judge Bazelon's dissent: Pet. App. A, 25-26).

At the hearing before respondent on February 17, 1967, counsel for petitioner represented to the court that a motion to suppress evidence on the ground of electronic eavesdropping would be filed and that the testimony of F.B.I. agents and telephone company employees would be required in connection with the motion (H. Tr. 9-10). The motion to suppress was filed on March 1, 1967. Respondent's opinion denying petitioner's motion for transfer issued on April 11, 1967. As to the legitimacy of claiming the convenience

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[1] "R. Br." refers to the "Brief For The Respondent In Opposition."

[2] "H. Tr." refers to the transcript of the hearing before Judge Gasch, a copy of which is on the file with the Clerk of this Court.

of F.B.I. agents on the motion for transfer, Chief Judge Bazelon, dissenting, observed:

> "The record shows that, in addition to trial witnesses, petitioner's counsel candidly told the District Judge that a motion to suppress evidence on the grounds of wiretapping would be filed by his client and that the testimony of certain F.B.I. agents would be required on the hearing of that motion. This, of course, explains the presence of F.B.I. agents on petitioner's witness list and *I assume that the expense and necessity of summoning witnesses for a suppression hearing, no less than for a trial, is a factor properly to be considered in a transfer motion.*" (Pet. App. A, 29, n. 9) (Emphasis added.)

The same reasoning applies perforce to the presence of the names of telephone company employees on petitioner's witness list.

The flavor of respondent's brief is that this proceeding somehow concerns a conspiracy hatched in the District of Columbia and, therefore, particularly repugnant to this jurisdiction. But this is not a conspiracy case; it is a three-count perjury case and the events about which perjured testimony is alleged to have been given occurred in Nevada.

## ARGUMENT

The thrust of respondent's argument is that the denial of petitioner's motion for transfer was a decision reached within the ambit of matters committed to the court's discretion and that it was a sound decision at that. For this proposition respondent relies on cases standing for the comfortably broad principle that mandamus is an appropriate remedy only in extraordinary circumstances—where it appears that

the lower court has acted outside its prescribed jurisdiction, has refused to exercise its authority when it has a duty to do so, or has grossly abused its discretion, citing *Will* v. *United States,* 389 U.S. 90 (1967); *Parr* v. *United States,* 351 U.S. 513 (1956); *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379 (1953); *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21 (1943). In short, it is argued that respondent did nothing extraordinary in denying petitioner's motion for transfer.

Of the cases cited in the preceding paragraph, only the *Holland* case concerns the appropriateness of mandamus to review the disposition of a motion for transfer and there the petitioner-plaintiff sought mandamus to vacate an order *granting* the severance and transfer of the trial of one of several defendants. But in cases involving the *grant* of a motion for transfer, the review of such action on a petition for mandamus is more restricted than where transfer has been *denied. Ackert* v. *Bryan,* 299 F. 2d 65 (2d Cir. 1962). Moreover, it is unquestionably the law that a petition for a writ of mandamus is the pre-eminently appropriate procedure for seeking review of the denial of a motion for transfer. *Akers* v. *Norfolk and W. Ry.,* 378 F. 2d 78 (4th Cir. 1967); *General Tire & Rubber Co.* v. *Watkins,* 373 F. 2d 361 (4th Cir. 1967); *Golconda Mining Corp.* v. *Herlands,* 365 F. 2d 856 (2d Cir. 1966); *A. Olinick & Sons* v. *Dempster Bros., Inc.,* 365 F. 2d 439 (2d Cir. 1966). What is more important, however, is that the denial of petitioner's motion for transfer is an event sufficiently extraordinary to warrant mandamus. *Ford Motor Co.* v. *Ryan,* 182 F. 2d 329 (2d Cir.), *cert. denied,* 340 U.S. 851 (1950). Judge Frank reasoned as follows (182 F. 2d at 330):

> "Judge Hand and I think this the kind of interlocutory order with which this court can properly

> deal by way of such a writ [mandamus], *since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred.* * * * We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. [footnote omitted] But we think this a sufficiently 'extraordinary cause'[4] to empower us to do so, *if the district judge erred.* [Emphasis added.]
>
> [4] *Ex parte Fahey*, 332 U. S. 258, 260, 67 S. Ct. 1558, 1559, 91 L. Ed. 2041."

*Accord, Shurin* v. *United States*, 164 F. 2d 566, 570 (4th Cir. 1947), *cert. denied*, 333 U.S. 837 (1948); *see Lindberg* v. *United States*, 363 F. 2d 438 (9th Cir. 1966).

In the case at bar, respondent has most certainly erred by employing an irrelevant and improper standard of judgment in denying petitioner's motion for transfer[3]—a standard which required petitioner to elect to forego his right to remain silent as a defendant in a criminal proceeding in order that he might have the convenience of his witnesses weighed. [Even had he made the disclosure required by respondent (discussed in this and succeeding paragraphs) there is no assurance that his motion for transfer would have been granted.] As to witnesses on the merits, respondent de-

[3] *Golconda Mining Corp.* v. *Herlands*, 365 F. 2d 856 (2d Cir. 1966) (by implication); *Ex parte Chas. Pfizer & Co.*, 225 F. 2d 720 (5th Cir. 1955) (dictum); *Chicago, R.I. & P.R. Co.* v. *Igoe*, 212 F. 2d 378 (7th Cir. 1954); *Wiren* v. *Laws*, 194 F. 2d 873 (D. C. Cir. 1951).

clined to consider the convenience of such witnesses and denied the motion for transfer because petitioner failed to demonstrate that such witnesses were *necessary* to his defense (Pet. App. C, 36). How does one demonstrate the "necessity" of witnesses without a thorough revelation of the theory and substance of their testimony? It simply cannot be done. In any event, petitioner, as the defendant in a criminal proceeding, may not properly be required to definitively enumerate and disclose the names of his witnesses and the nature of their testimony well in advance of trial. The proper inquiry is directed to the location of "possible"[4] or "potential"[5] or "probable"[6] witnesses. The impropriety of the disclosure required by respondent has been the subject of recent discussion by a trial court:

> "The Government has, by virtue of the charges leveled at the defendants, made an issue both as to their character and their way of life. It would not be in the interest of justice under such circumstances to place a burden on the defendants' ability to introduce evidence and witnesses to rebut such contentions. They are, in the last analysis, presumed to be innocent of the charges. *They should not be forced to anticipate—certainly at this early stage—the course of the litigation which will undoubtedly be protracted, and to identify specifically the individuals they intend to call as witnesses. The statement by defendant Jessup in this regard is sufficient to establish that numerous residents of the Gulfport-Biloxi area will be called to testify, and that these persons will make up the great bulk of the witnesses for the defense.*

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[4] *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 244 (1964).

[5] *United States* v. *Kimball Securities, Inc.*, 25 F.R.D. 172, 174 (S.D.N.Y. 1960).

[6] *United States* v. *White*, 95 F. Supp. 544, 551 (D. Neb. 1951).

"The Government further attacks defendants' assertions that they are men of moderate financial means, and that for this reason the expense involved in coming to Nashville for trial would be a burden on them. In their affidavits the defendants contend that they are of moderate financial means. For the purpose of deciding on this motion, it seems to be elementary that their financial means would not be a controlling factor. Surely the Government does not contend that Rule 21(b) was only intended to benefit the poor. It seems to the Court that the clear import of the term 'interest of justice' as it applies to financial expenditures by movant defendants is that it would be in the interest of justice to transfer an action if the expense to be incurred by the defendants if the action were not transferred is considerably greater or more burdensome than the expense which would be necessary if the action were transferred. And this is true whether the defendant be rich or poor. It should not be necessary that a defendant show poverty, or refrain from hiring the best counsel he can obtain, or refrain from conducting such investigations as he can afford, in order to be able to take advantage of this rule. And, taking this as the test, it is clear that by establishing the need for transporting from defendants' home district between 65 and 80 persons some 560 miles the defendants have established a considerable financial burden incident to a trial in this district."[7] (Emphasis added.)

Respondent denied petitioner's motion for transfer despite the fact that petitioner disclosed the names, addresses and occupations of potential defense witnesses and "indicated in some degree the nature of the evidence witnesses on the merits were expected to furnish . . . [and] undertook a general showing on the materiality of the testimony of most of the witnesses

[7] *United States* v. *Jessup*, 38 F.R.D. 42, 46-47 (M.D. Tenn. 1965).

named on his list." (Pet. App. A, 14) Thus, it is unmistakable that respondent intended to require, and did require, more than just a clue to the relevancy of the testimony of petitioner's potential witnesses (R. Br. 9); he required a demonstration of the necessity of each and every witness on the merits and such a demonstration is impossible without revealing the entire mosaic of petitioner's defense and the place of each witness in it. It is equally unmistakable that for failure to make such a disclosure, respondent considered none of petitioner's witnesses on the merits in weighing the convenience of witnesses. In his dissent, Chief Judge Bazelon observed as much (Pet. App. A, 22):

> "It seems clear from the District Court's opinion that it struck all of petitioner's 29 non-character witnesses from consideration because he had not overcome the court's 'doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense.' If furnishing the names, addresses and occupations of the witnesses together with 'a general showing on the materiality of the testimony of most of the witnesses named' is sufficient, and I am inclined to think that it is, I suggest we are bound to remand with directions to apply this view. *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964)."

Respondent's brief in opposition does not touch the subject of petitioner's character witnesses except to observe that "'sound judicial management would suggest' that the number of petitioner's character witnesses be limited. . . ." (R. Br. 7). This, of course, does not come to grips with the problem, for surely petitioner is entitled to *some* character witnesses. Chief Judge Bazelon again put his finger on the deficiency of respondent's decision (Pet. App. A, 25):

> "Moreover, I think the role of character witnesses is entitled to specific consideration in the balancing process. Of course, a trial court has broad discretion to limit the number of character witnesses that may be called. But I take it as settled that the court cannot prevent the defense from presenting a reasonable number of these witnesses, particularly in a perjury case where this testimony is of unusual importance. In this connection, it is reasonable to consider not only the expense and inconvenience of transporting character witnesses across the country, but the unavoidable dilution of their testimony which naturally attends trial in a distant location. *United States* v. *Johnson,* 323 U.S. 273, 279 (1944) (concurring opinion)."

The Chief Judge's reference to *United States* v. *Johnson* was particularly aimed at these trenchant observations by Mr. Justice Murphy:

> "Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence. . . . The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. *Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations."* (Emphasis added.)

The irony of respondent's position is complete with his reliance on *Will* v. *United States,* 389 U.S. 90 (1967) (R. Br. 8). In that case, the government sought mandamus to require the trial judge to vacate an order which the government feared would lead to the disclosure of the names of its witnesses. Here the same

spirit is at work; the government, with respondent's sanction, has successfully resisted petitioner's motion for transfer on the representation that it has thirteen District of Columbia witnesses. Respondent did not inquire and the government did not offer to demonstrate that these witnesses were necessary to relevant matters of proof in the government's case (H. Tr. 36, 43). Yet, the convenience of the government's District of Columbia witnesses was considered and given fulll weight (Pet. App. C, 37-38).

Petitioner, on the contrary, had none of his prospective witnesses considered—this for failure to make a disclosure even more thoroughgoing than that feared by the government in *Will* v. *United States, supra at* 9. The futility of petitioner's motion for transfer is thus starkly displayed. He may remain silent or make a general showing as to the materiality of the testimony of his witnesses and have his motion denied for certain, or he may elect the penalty of disclosing the theory and substance of his defense well in advance of trial in the hope, but without the assurance, that he may be tried close to home and close to the sources of his proof.

## CONCLUSION

This is a case of first impression, presenting questions as to the proper implementation of new Fed. R. Crim. P. 21(b) (effective July 1, 1966). The decisions of the courts below will require petitioner and his more than 60 witnesses to travel some 2,500 miles from their homes to participate in the presentation of his defense. These decisions were reached in the face of a new rule whose framers quite explicitly expected would facilitate rather than inhibit the trial of criminal proceedings in districts most convenient for parties and witnesses.

*See* Notes of Advisory Committee on Rules, 18 U.S.C.A. Rule 21, 1967 Pocket Part at 206. The opposite result has been reached here. And the legitimate inquiry immediately comes to mind: If a transfer is not warranted by the circumstances of this proceeding, when would a transfer be warranted?

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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